No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JOSEPH T. BUDD, JR., AND FLORENCE W. BUDD, CO-PARTNERS, DOING BUSINESS AS J. T. BUDD, JR., AND COMPANY, KING EDWARD TOBACCO COMPANY OF FLORIDA, AND MAY TOBACCO COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX IN REPLY

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The appendix to the brief filed by respondents *Budd* and *King Edward* quotes excerpts from certain publications of the Department of Labor, as well as a published statement of a former Solicitor of Labor, which are quoted out of their context. This Supplemental Appendix is filed to show the proper context of these excerpts. Also included in this Supplemental Appendix are Item 4, which is a quotation from a Department

of Agriculture publication directly pertinent to Respondents' assertion that there is no market for cigar leaf tobacco before it has been bulked (br. of *Budd* and *King Edward*, p. 29); and Item 5, which is the full text of the Report and Recommendations of the Presiding Officer, dated June 9, 1954, "In the matter of the definition of the 'area of production' as used in Sections 7 (c) and 13 (a) (10)," to which reference is made in the briefs of both petitioner (p. 25) and of respondents *Budd* and *King Edward* (pp. 77–78, n. 41).

1. Section 1 of Appendix C, page 102 of the brief of respondents *Budd* and *King Edward*, quotes only the bracketed portions of paragraph 10 of *Interpretative Bulletin No. 14*:

* * * * * *

[It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer:] The line between practices which are incident to or in conjunction with farming operations, and those which are not, is not susceptible of precise definition. *The agricultural exemption, however, would seem to include only practices which constitute a subordinate and established part of the farming operations.* Factors that would indicate that the practices performed by a

farmer are thus subordinate would be, among other things, that most of the employees engaged in such practice are normally employed also in farming operations upon the farm, and *that these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business.* [Emphasis added.]

* * * * *

2. Section 2 of Appendix C, page 106, of Respondents' brief quotes only the bracketed portions of the answer of the Solicitor of Labor to a question regarding application of the agriculture exemption to tobacco warehouses:

* * * * *

Answer (Solicitor of Labor): [You ask whether the handling of the broad leaf and shade grown tobaccos, including all of the operations in the warehouse, comes within the Section 13 (a) (6) exemption. This exemption may under proper circumstances apply to the operations performed on the tobacco by the growers provided that these operations are "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." It appears that the companies are engaged in the growing of tobacco. The operations to which you refer may under proper circumstances be incidental to or in conjunction with the farming operations performed by them or on their farms. You are correct in your assumption that in any weeks in

which one of the companies is engaged in operations on tobacco other than that grown on its own farms, the Section 13 (a) (6) exemption will be defeated.] For the weeks in which the companies are engaged in warehousing only the tobacco grown on their own farms, *you should consider the tests set forth in paragraph 10 of Bulletin 14. The following factors must also be considered:* (1) the number of employees working in the warehouse, as contrasted with number working on the farms; (2) the number of man-hours worked in the warehouse, as compared with the number worked on the farm; (3) the amount of the warehouse payroll, as compared with the amount of the farm pay roll; (4) the extent, if any, to which the employees are interchanged between warehouse and farm work; and (5) the investment that the employer has in the warehouse and warehouse equipment, as compared with the investment in the farm and farm equipment. [Emphasis added.]

[The Section 13 (a) (6) exemption is not limited to the first drying of a commodity but may also apply to redrying. Nor is this exemption limited to "first processing" operations. Under proper circumstances it may apply to further processing of agricultural commodities if the tests set forth in paragraphs 10 and 11 of Interpretative Bulletin No. 14 are met.]

3. Section 2 of Appendix D, page 110, of Respondents' brief, quotes only the bracketed portions of the Administrator's Release M–12:

> The new definitions of the area of production issued by the Administrator of the Wage and Hour and Public Contracts Divisions of the U. S. Department of Labor, may affect the labor costs of employers in the tobacco industry, as their status with regard to taking exemptions from the minimum wage and overtime provisions of the Fair Labor Standards Act may be changed. The Divisions began enforcing the new definitions on March 1, 1947.
>
> The editors of [ ] therefore believe that men in the tobacco industry will benefit from this official resume of the new definitions' terms, furnished by the Divisions. * * *
>
> * * * * * *
>
> TWO AREA OF PRODUCTION EXEMPTIONS
>
> There are two types of exemptions which are dependent upon the area of production. One is an exemption from both the minimum wage and overtime requirements of the Act, *and the other is an exemption from the overtime provisions only,* for a 14 week period each calendar year during seasonal operations.
>
> *Both types of exemptions are concerned with operations on agricultural or horticultural commodities.* For the purposes of these exemptions, agricultural or horticultural commodities are such commodities as

they come from the farm and before their natural state has been changed or destroyed, or as they are customarily harvested and marketed by the farmer. For example, *tobacco which has been stemmed or fermented would not qualify as an agricultural commodity.*

MINIMUM WAGE AND OVERTIME EXEMPTION

[If your employees are engaged within the area of production in the handling, packing, drying or stripping of tobacco *for market* they are exempt from both the minimum wage and overtime provisions. The "for market" requirement applies to each of the specified operations. Thus, employers of a cigar manufacturer who are handling tobacco for use by chief employer in the manufacture of cigars are not exempt, because they are not handling tobacco "for market."

[To aid employers in judging whether their employees' activities are within these specific operations, the following interpretations are offered:

["Handling" includes those physical operations customarily performed in obtaining tobacco, transporting it to and receiving it at the establishment, weighing it, placing the tobacco in the establishment, and delivering it to warehouses or to transportation facilities.

["Packing" includes operations involved in placing tobacco in containers, and closing or fastening the containers.

["Drying" may be performed by natural methods or by exposure to heat from ovens, furnaces, etc.

["Stripping" includes the pulling of tobacco leaves from the stalk, tying the tobacco leaves into hands, grading, and sorting.]

The Divisions want you to understand that only employees who are actually engaged in these specified operations will be within the exemption. * * * Moreover, if in any workweek an employee is engaged both in exempt operations and operations other than those specified as exempt, he would not be within the exemption during that week.

LIMITED OVERTIME EXEMPTION

If your employees are not within the exemption from both the minimum wage and overtime provisions, they may qualify for the second type of area of production exemption. Under the latter, *employees of an employer who is engaged in the first processing of tobacco within the area of production are exempt from the overtime provisions of the Act—but not from its minimum wage provisions*—for not more than 14 workweeks in the aggregate in the calendar year during seasonal operations.

The "first processing" of tobacco means the making of the first change in the tobacco from the form in which it normally comes from the farm. *The stem-*

ming, or redrying, or fermenting of tobacco may be a first processing operation, depending on which of these operations is performed first. Thus where cigar tobacco is "green stemmed," the stemming would be the first processing operation and the subsequent fermenting would not be so included. However, *where the tobacco is fermented before being stemmed, the fermenting would be the first processing and the stemming would not so qualify.*

The application of this exemption is restricted to establishments where first processing operations are carried on, and covers those employees who are actually engaged in first processing operations and those workers whose occupations are a necessary incident to such activities and who work solely in those portions of the premises devoted by their employer to these activities.

During weeks when a plant is engaged exclusively in the first processing of tobacco, all employees working in the plant are considered to be within this exemption, including office employees, watchmen, maintenance workers and warehousemen. [Emphasis added.]

* * * * *

4. Quotation from U. S. Department of Agriculture, Farmers' Bulletin No. 523, *Tobacco Curing* (1947), pp. 9–10:

> [Cigar tobacco] leaves, as stripped from the stalk [and after curing], * * * are

tied into "hands" of 15 to 30 leaves, using a leaf as a binder. These hands are packed into cases, *and the tobacco is then ready for market* * * *.

Before the leaf is ready for the manufacturer it must undergo a process of fermentation, commonly spoken of as "sweating." Carrying out this process successfully requires a thoroughly equipped plant, with facilities for controlling ventilation, temperature, and humidity. *As a rule, therefore, the growers sell their leaf in the bundle to the packers, who make a business of carrying on the fermentation on a large scale.* [Emphasis added.]

* * * * * *

Nearly all shade-grown tobacco is cured in part with artificial heat. * * * Under favorable conditions curing will be completed in 4 to 6 weeks. The cured leaf is taken down and tied into hands, which are delivered to the packer in either of the ways described in the preceding section. (Quoted above.)

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5. *Report and Recommendation of the Presiding Officer, dated June 9, 1954, "In the matter of the definition of the 'area of production' as used in Sections 7 (c) and 13 (a) (10)"* (unpublished but available in the official records of the Department of Labor).

I

BACKGROUND OF THE PROCEEDING

The statute and regulations.—Sections 13 (a) (10) and 7 (c) of the Fair Labor Standards Act require that the Administrator define "area of production." The former provides year-round exemption from both the minimum wage and overtime pay provisions for any individual employed within the area of production engaged in certain enumerated operations on agricultural or horticultural commodities or in making dairy products. The latter section provides, among other things, exemption during 14 workweeks from the overtime pay provisions alone for employees in a place of employment where their employer is engaged in the first processing within the area of production of agricultural or horticultural commodities, during seasonal operations.

The present definition of "area of production" is contained in Regulations, Part 536, and has been in effect since December 1946. It defines area of production in terms of two principal criteria—location in the open country or in a rural community (generally referred to as the "population" test), and the distances from which the raw materials are received (the "mileage" test). The distances vary depending upon the commodities involved. The definition was adopted after extensive studies, including conferences with interested representatives of labor

and industry, and detailed economic reports dealing with the commodities affected, and after six formal public hearings, all undertaken after the U. S. Supreme Court declared invalid a definition based in part on the number of employees.

Earlier definitions.—The first definition of "area of production," issued by the Administrator in October 1938 coincident with the effective date of the Act, relied on the criteria of number of employees and receipt of raw materials from farms in the immediate locality. Amendments effective in December 1938 and February 1939 added special provisions for dry edible beans and Puerto Rican leaf tobacco. Effective in April 1939, the Administrator added a provision applicable to perishable and seasonal fresh fruits and vegetables which used as criteria location in the open country or in a rural community, and "immediate locality." Immediate locality was defined to exclude distances of more than 10 miles.

The definition was amended and revised in June 1939 to extend the population and distance criteria of the fresh fruit and vegetable definition to all agricultural or horticultural commodities. The seven-employee limitation (an alternative for the population test) was retained; the "immediate locality" phrase previously used was changed to "general vicinity."

By an amendment published in October 1940, applicable solely to perishable or seasonal fresh

fruits and vegetables, the criteria for exemption were limited to the general vicinity and number of employee tests, and the number of employees raised from seven to ten. Effective April 1941, the regulations were amended to apply the fresh fruit and vegetable definition to all commodities other than "dry edible beans" and "Puerto Rican leaf tobacco." In January 1942, the definition for Puerto Rican leaf tobacco was amended.

It should be noted that during the period when the definitions were being developed, there were several public hearings at which all interested parties were afforded an opportunity to be heard on all relevant factors which might be considered in promulgating a definition.

The "Holly Hill" decision.—In its decision in *Addison v. Holly Hill Fruit Products, Inc.* (322 U. S. 607, 1944), the U. S. Supreme Court held that "area of production" could not be defined validly in terms of number of employees. The court noted the Congressional intent to distinguish between rural communities and urban centers and indicated in the following language the general principles for drafting a new definition:

> The textual meaning of 'area of production' is thus reinforced by its context: 'area' calls for delimitation of territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural com-

modities and more or less near their production. The phrase is the most apt designation of a zone within which economic influences may be deemed to operate and outside of which they lose their force. In view, however, of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress itself. Neither was it deemed wise to leave such economic determination to the contingencies and inevitable diversities of litigation. And so Congress left the boundary-making to the experienced and informed judgment of the Administrator. Thereby Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter, that is the fixing of minimum wages and maximum hours.

In delimiting the area the Administrator may properly weigh and synthesize all such factors.

The Fair Labor Standards Amendments of 1949.—Following the adoption of the Fair Labor Standards Amendments of 1949, which, among other things, increased the statutory minimum wage requirement to 75 cents, a number of persons petitioned the Administrator to amend or modify the present definition. These petitions alleged that substantial economic discrimination exists between establishments which meet the requirements of the present definition and those which do not. The petitions also alleged that

changes had taken place in regard to the economic conditions and other related factors which provided the basis for the existing regulations. In response to these petitions the Administrator published notice on September 7, 1950, that he would receive and give consideration to specific proposals for changes in the definition.

II

THE PRESENT PROCEEDING

Among the responses received to the Administrator's notice, most requested that a public hearing be held. The Administrator thereupon (February 21, 1951) gave notice that a public hearing would be held.[1] The notice of hearing announced that "interested persons will be heard with respect to Regulations, Part 536, defining 'area of production' as used in sections 7 (c) and 13 (a) (10) of the Act on the questions:

"(1) Whether any changes or modifications are now required.

"(2) What changes or modifications should be made if any are required."

The Administrator authorized the presiding officer to submit "a report of the proceedings together with his recommendations as to the action to be taken thereon."

[1] The notice also made available for examination and study all the proposals submitted in response to the notice of September 7, 1950. A brief summary of these proposals was prepared and made available to interested parties upon request. Exhibit No. 1.

The hearing was convened pursuant to that notice, before the undersigned, duly designated as presiding officer.

In order to make the record more usable, appearances were scheduled by groups, roughly divided by industry. Representatives of both industry and labor in these groups appeared and testified on the following dates: fresh fruits and vegetables, April 2–3, 1951; dairy products, April 3, 1951; peanuts and tobacco, April 4, 1951; grain and dry edible beans, April 5, 1951; cotton, April 6, 1951; tung nuts and miscellaneous, April 9, 1951. All interested parties were given full opportunity to testify and to cross-examine witnesses. The records of all previous hearings on the definitions of "area of production" were incorporated into the record of this proceeding by reference. Proposals for changes in the definition made in response to the Administrator's request of September 7, 1950, were also incorporated into the record as were the statements in lieu of personal appearance. The total record of the hearing thus includes the complete records of the hearings held in 1938–39, 1939–40 and 1944–45, as well as over 800 pages of verbatim transcript, 73 statements in lieu of personal appearance, 45 exhibits, and approximately 150 responses to the Administrator's request for proposals.[2]

[2] The verbatim transcript is hereafter referred to as "tr.," statements in lieu of personal appearance as "S. L.," and pro-

Although the widest possible notice was given, the number and nature of personal appearances at the hearing evidenced considerably less interest than, for example, in the hearings held in 1944–45.[8] Notably absent were appearances by organizations representing large segments of the industries engaged in canning and packing perishable or seasonal fresh fruits and vegetables. Relatively little interest was evidenced also by the dairy industry, with a personal appearance entered only on behalf of one state cooperative association. The apparent lack of interest of these major industry groups is particularly remarkable in the light of the fact that approximately one-half of all the employees who might be affected by the definition are employed in operations performed on fresh fruits and vegetables and as many as an additional one-fourth of such employees are employed in making cheese, butter or other dairy products. Also notable was the absence of representation on behalf of the poultry, egg, and cigarette tobacco industry groups.

III

THE LEGAL ARGUMENTS

Population and mileage criteria void.—Much of the testimony at the hearing was to the effect that

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posals for changes in the definition made in response to the Administrator's request of September 7, 1950 as "prehearing proposals."

[8] A complete list of those who appeared personally is set forth in Appendix I.

the Administrator was without legal authority to use either the population or mileage criterion of the present regulations in defining "area of production." This testimony included many references to the legislative history of section 13 (a) (10), to the *Holly Hill* decision of the U. S. Supreme Court, and to decisions of other courts.[4] Some of it was marked with the warning or prediction of the witness that if the Administrator did not delete these criteria, they would be stricken in litigation.[5] Thus, one of the leading witnesses for the cotton industry, counsel for the national, regional, and state cotton compress and cotton warehouse associations, testified that the principal reason for urging a change in the definition is a legal one—that the present definition is not valid—rather than because there are economic and competitive factors that cause hardship.[6] Counsel for one of the peanut associations urged that under the *Holly Hill* decision the population of the town in which a plant is located is no more pertinent to a definition of area of production than is the number of employees.[7] Counsel for the tung nut industry, who also appeared as counsel for one of the cotton ginners associations, argued that the population test is void.[8]

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[4] See, for example, tr. pp. 199–203, 715–717. See also Exhibits 13, 41.

[5] See, for example, tr. pp. 248, 317.

[6] Tr. p. 637.

[7] Tr. p. 317.

[8] Tr. p. 781.

In promulgating the present definition, the Administrator determined, on the basis of the legislative history, the various court decisions, and the available economic data, that "The best available criteria for delimiting territory in relation to the complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production, and for distinguishing between 'rural-agricultural' and 'urban-industrial' conditions in accordance with the intent of Congress were found to be: (1) the distances from which the enterprises obtained the commodities on which they performed the operations named in the statute; and (2) the nature of the community in which they were located, as indicated generally by a population test."[9] The Administrator's opinion that these criteria are valid under the statute and pertinent decisions of the courts, is followed in this report.[10]

[9] Findings of the Administrator, Dec. 18, 1946, p. 2.

[10] There can, of course, be no doubt that the validity of the criteria employed by the Administrator in defining "area of production" is a question which will ultimately be decided by the courts, where it is now being litigated. After the close of the hearing, the validity of both the mileage and population tests was sustained in *Tobin* v. *Traders Compress Co.*, 199 F. 2d 8 (CA 10, 1952), cert. den. 344 U. S. 909 (1952). It is the position of the Administrator that the decision in this case represents a sound view, which the Administrator

IV

PROPOSALS FOR CHANGE

Complicity of the problem. The Administrator, in the annual reports to the Congress and in

will follow until and unless the Supreme Court decides to the contrary.

In the *Tryders Compress* case the court held:

> While the number of employees of an establishment has been excluded from the choice of economic factors available to the Administrator, we think the distance from which enterprises obtain commodities on which they perform operations enumerated in the statute is distinctly relevant to the definition. That test was one of the basic criteria in the *Addison* case, and the court, impliedly at least, sanctioned its relevancy as a permissible economic factor * * *.
>
> Having in mind that the primary object of the definition is to attempt to arrive at an economic balance between rural and industrial labor conditions, and also having in mind that no formula has yet been devised or suggested for the satisfactory attainment of that objective, we cannot say that population of cities and towns is not a relevant economic factor in determining whether labor conditions are predominantly rural or industrial. This is especially so in view of the admonition that the Administrator, not the court, is charged with the duty of promulgating a definition to achieve the economic purposes of the exemption.
>
> It is our conclusion that the Administrator's definitive regulation is based upon relevant economic factors that it does bear a reasonable relationship to the purposes of the exemption, and is therefore not arbitrary and capricious.

A different conclusion was reached in *Jenkins v. Durkin*, 205 F. 2d 941 (C.A. 5, 1954), rehearing denied Feb. 10, 1954. That court held:

> * * * we are of the opinion that as to the exclusion therefrom [exemption under section 7 (c) from the

appearances before Congressional committees, has pointed to the need for revision of the complicated system of exemptions available under the Act for agriculture and for the handling and processing of agricultural products.[11] Sections 13 (a) (6) and 13 (a) (10) provide year-round exemption from both the minimum wage and overtime pay requirements; section 7 (c) provides either a 14-workweek or a year-round overtime exemption; and section 7 (b) (3) provides a partial relaxation of the overtime requirements for seasonal industries during 14 workweeks. The exemption under section 13 (a) (6) depends on the employee's *employment in agriculture* as defined in the Act. In section 13 (a) (10), the applicability of the exemption is conditioned upon the employee's *engagement in specifically enumerated activities*, some of them also frequently

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overtime provisions of the law] of plants located in or within one mile of towns of 2,500 population or over, the present definition is invalid. * * * while there certainly are good economic arguments to be made against restricting the area within a twenty mile limit, they do not at all show that the distance fixed was arbitrary and without relation to "area of production" as the Congress used that term. * * *

In the *Jenkins* case the Fifth Circuit ruled that Jenkins was not entitled to the "area of production" exemption in section 7 (c) of the Act. Although the court ruled that the population test of the exemption was invalid, it appears that it was not technically required to do so for decision. This ruling is effective only in the States over which that Court has appellate jurisdiction.

[11] See, for example, 1948 Annual Report pp. 123–134.

performed on a farm and, in that event, within "agriculture" as defined in the Act. Under section 7 (c), exemption depends on the employees' *engagement in a place of employment where their employer is engaged in named operations*, some of them identical with activities enumerated in section 13 (a) (10). Under section 7 (b) (3), exemption is applicable to all *employees in an industry* found by the Administrator to be of a seasonal nature.

An example of the complexities involved can be seen in the application of these provisions to the packing of fresh fruits and vegetables. In appropriate circumstances, such packing if performed on the farm is considered "agriculture" and the exemption under section 13 (a) (6) is applicable. If the section 13 (a) (6) exemption is not available, but the packing is performed within the "area of production," employees who are physically engaged in such packing for market (but not watchmen, clerical or maintenance employees) are exempt under section 13 (a) (10). In any event, exemption from the overtime provisions is available for 14 workweeks under section 7 (c). If the establishment is exclusively engaged in packing, watchmen, clerical and maintenance employees are also exempt under section 7 (c). If the employer's establishment is not exclusively engaged in packing, exemption for such employees is available when their activities are a necessary incident to the packing operations

and they work solely in those portions of the premises devoted by their employer to the packing operations. Without regard to the applicability of sections 13 (a) (6), 13 (a) (10) and 7 (c), an exemption from overtime pay requirements for work up to 12 hours in any workday or 56 hours in any workweek for not over 14 weeks in the aggregate in any calendar year is available under section 7 (b) (3) for employees of a fresh fruit or vegetable packer (including watchmen, clerical and maintenance employees) because fresh fruit or vegetable packing has been determined to be of a seasonal nature.

In the context of this complex structure of statutory provisions, it is understandable that several of the proposals and representations made at the hearing reflected confusion as to the purpose of the hearing and the authority of the presiding officer and the Administrator. Statements made by or submitted on behalf of several such proponents revealed, for example, a misunderstanding of the applicability of the exemptions under sections 7 (c) and 13 (a) (10), apart from the definitions of "area of production;" and further, that they did not understand the relation between these so-called "area of production exemptions" and the exemptions under section 13 (a) (6) and those portions of section 7 (c) which do not refer to "area of production." Because of this misunderstanding, much of the testimony given by the witnesses for these proposals

could not be considered pertinent to the proceeding.

In both section 13 (a) (10) and that part of section 7 (c) which refers to "area of production," the statute is explicit as to the operations and other conditions under which exemption may become available. The only discretion given the Administrator arises from the duty to define "area of production." The Administrator is not authorized to add or subtract from the operations enumerated in those sections. Employees engaged in the operations enumerated in section 13 (a) (10), who meet the tests of the regulations, are exempt from the minimum wage and overtime pay provisions of the law without further action by the Administrator. Conversely, the Administrator has no authority to make exemption available under section 13 (a) (10) to employees other than those engaged in the enumerated operations.

That these limitations on the authority of the Administrator (and therefore necessarily on the authority of the presiding officer and the scope of this hearing) are not completely understood was manifest from some of the proposals made at the hearing. An example of the misunderstanding is the proposal of the one group of cigar tobacco processors who appeared at the hearing.[12] It was stated on their behalf that in the "bulking" operation, overtime does not constitute a

[12] Tr. pp. 380–383.

problem.[13] Their appearance was directed toward the minimum wage exemption under section 13 (a) (10). The courts have reviewed and approved the Administrator's position that the "bulking" of cigar leaf tobacco is not among the operations enumerated in section 13 (a) (10).[14] Under these circumstances, regardless of the definition of "area of production," the Administrator is without authority to consider employees engaged in bulking cigar tobacco exempt under section 13 (a) (10). It seems clear that the difficulties encountered by these employers are attributable to the statutory provisions rather than the definition of area of production.

Similar misunderstanding is apparent from the statement on behalf of an employer engaged in the ginning of cotton. That statement urged that the "area of production" definition be amended to exempt repairmen and off-season labor from wage and hour coverage.[15] The same difficulty

[13] Tr. pp. 373–374.

[14] See, for example, *Puerto Rico Tobacco Coop Assoc.* v. *McComb*, 181 F. 2d 697 (CA 1, 1950). Several of the type 62 tobacco packers who appeared at the hearing urged the position taken at the hearing in litigation in the U. S. District Court, Northern District, Fla., entitled *Durkin* v. *Budd, et al.* The decision of that court, 114 F. Supp. 865, rejected their contention that the exemptions under sections 13 (a) (6) and 13 (a) (10) were applicable.

[15] S. L. #31. See also, for example, the prehearing proposal submitted by the Agricultural Producers Labor Committee which would add to the operations for which exemption is available under section 13 (a) (10), those operations "directly connected with and essential to" the "functions" mentioned in the statute.

appears from the language of the definitions proposed by some of the segments of the fresh fruit and vegetable industry which were represented at the hearing. The language proposed would have the effect of extending exemption under section 13 (a) (10) to employees engaged in other than the enumerated operations.[16] In each of these instances the recommended action is beyond the authority of the Administrator and of the presiding officer.

In the course of the hearing it developed also that there was misunderstanding among some representatives of the cotton industry as to the effect of the definition of "area of production" under section 7 (c) on the overtime exemption available under that section for the ginning and compressing of cotton.[17] Under section 7 (c) a year-round exemption from the Act's overtime pay provisions is available for employees of an "employer engaged in the * * * ginning or compressing of cotton * * * in any place where he is so engaged." This provision is not limited by any reference to "area of production" and is therefore available without regard to the definition of "area of production." Finally, misunderstanding of the exemption for employees employed in agriculture under section 13 (a) (6) and the "area of production exemption" appeared from the testimony of representatives of

[16] Tr. pp. 61, 104.
[17] Tr. pp. 389-91.

grower-owned and cooperative vegetable packing houses."[18]

THE NEED FOR CHANGE

The first question posed in the notice of hearing was whether there is a need for change or modification in the present definition. In developing the necessary information on the basis of which a recommendation on this question could be made, the major avenues of inquiry at the hearing were: (1) the extent to which employees engaged in the enumerated operations were being paid at least 75 cents an hour, (2) the extent to which such employees work overtime hours for which an overtime premium must be paid, and (3) the extent of the discriminatory effects.

Minimum wage.—The preponderance of the evidence at the hearing is to the effect that payment of the 75 cents statutory minimum wage was not then a problem.[19] It is clear from the evidence that the primary concern of some of the

[18] Tr. pp. 22–56.

[19] See, for example, tr. pp. 42, 55, 117 and 231 (fresh fruits and vegetables); tr. pp. 272, 282 (dairy products); tr. p. 310 (peanuts); tr. pp. 426, 466, 471, 487, 587 (grain); and tr. pp. 682, 694 (cotton). There was also testimony indicating that in some few areas less than 75¢ an hour is actually paid. See, for example, tr. p. 691 and Exhibit 41 (cotton). It should be noted also that although testimony on behalf of the Maine dry edible bean packers was to the effect that at least 75¢ is now being paid, the employers sought authority to pay, and stated that the employees would accept, less than 75¢. Testimony as to the discriminatory effects of the exemptions under section 13 (a) (10), for example, was also considered rele-

witnesses was the possibility that relief might be needed at some time in the future rather than at the time of the hearing. These witnesses seemed concerned with the need to provide an escape valve so that if it becomes necessary at some time in the future, authority for paying less than 75 cents per hour will be available. With respect to the fresh fruit and vegetable industry, for example, there was testimony of the tenor, "We would do that (pay 80, 85 and 90 cents an hour) under these conditions anyhow, but if things turn * * *," [20] and "as far as the cents per hour is concerned, it would not have any effect on us now. What it might have in the future, I don't propose to predict." [21] For the cotton industry it was testified that 75 cents an hour was being paid in most cases but that "before we get far from this hearing that minimum wage might be raised." [22] Concerning the peanut industry, there was testimony that although 75 cents per hour was being paid, the industry was "not able to foresee the future" [23], and that it was necessary when the

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vant to the question of whether the requirement to pay the minimum wage constitutes a significant problem.

In the period between the dates of the hearing and the writing of this report (March 1954) the average wage level has risen substantially and it is reasonable to conclude that payment of the minimum wage is even less a problem at the present time.

[20] Tr. p. 56.

[21] Tr. p. 117.

[22] Tr. p. 684.

[23] Tr. p. 327.

time comes to be able to pay less "we should have the law such that it can be made available."[24] Such testimony indicates at least that the requirement of paying the statutory minimum wage is not imposing any significant economic hardship in these industries and consequently would not support a finding that there is a present need for changing or amending the definition.

Overtime pay.—In determining whether need exists for changing the definition, consideration must also be given the effect of the requirement of paying additional overtime wages under section 7 of the Act. A significant factor in such consideration is the availability of exemption from the Act's overtime requirements under sections 7 (b) (3) and 7 (c). Thus, without regard to location within the area of production, year-round exemption from the overtime pay requirements is available under section 7 (c) for the employees of an employer engaged in the first processing of milk, buttermilk, whey, skimmed milk or cream into dairy products, or in the ginning and compressing of cotton in any place of employment where he is so engaged. On the same basis, exemption from the overtime pay requirements is available during 14 workweeks in each calendar year for the employees of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables or in handling livestock. As

[24] Tr. p. 346.

a result of these provisions, a large proportion of the industries represented at the hearing now enjoy complete exemption from the overtime pay provisions for at least 14 workweeks in the calendar year, and many for the entire year, under section 7 (c).[25] Section 7 (b) (3), the provisions of which have already been referred to,[26] provides 14 workweeks of limited overtime exemption for many of the industries represented at the hearing. In some of these instances, e. g. first processing, canning and packing of fresh fruits and vegetables, the 14 workweeks of exemption under section 7 (b) (3) are in addition to the 14 workweeks of exemption under section 7 (c).[27]

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[25] The storage of grain and cotton are the significant exceptions; others are the processing of tung nuts and of type 62 tobacco. Both grain and cotton storing have limited overtime exemptions as seasonal industries under section 7 (b) (3). There is pending before the Divisions a proceeding to determine whether the processing of tung nuts is an industry of a seasonal nature under section 7 (b) (3). The testimony as to the processing of type 62 tobacco is that overtime pay is not a problem. (See tr. pp. 373–374.)

[26] See p. 20 above.

[27] Examples of other industries which have been determined to be of a seasonal nature, as a result of which the industries may avail themselves of the exemption under section 7 (b) (3) are: Storing of raw cotton; receiving, ginning and baling cotton and handling baled cotton and cottonseed; handling, preparing in their raw or natural state and storing perishable or seasonal fresh fruits or vegetables; storing of grain, including soybeans, flaxseed and buckwheat; flat warehousing of grain; artificial drying of alfalfa hay and subsequent manufacture of meal; and warehousing of unshelled peanuts.

These provisions for complete or partial exemption from the statutory overtime pay provisions appear to meet the needs of the industries that participated in the hearing and point to the conclusion that the overtime pay requirement is not imposing any significant economic hardship in these industries. Substantial support is lent this conclusion by the lack of evidence of hardship resulting from the requirement to pay overtime wages. As in the case of the testimony indicating that payment of the minimum wage was not then a problem, the record as a whole does not support a finding that there is a present need for changing or amending the definition because of hardship arising from the requirements for overtime pay.

Discriminatory effects.—Although the evidence reflected that in general there were no ill effects resulting from the statutory minimum wage and overtime pay requirements in cases in which the requirements of the area of production definition are not met, there was evidence tending to establish that economic hardship results or may result from the operation of the definition. The relatively small group of employers so affected find little solace in the fact that there are generally no ill effects.[28] Their concern is with the fact that other establishments enjoy a competitive advantage. Thus, among the proposals received in re-

[28] That the discriminatory effects are not more widespread appears to be due in some measure to the steady upward movement of the general wage level since World War II.

sponse to the Administrator's original request, employers in the fresh fruit and vegetable industry in the Norfolk, Virginia, area complained of the advantage of other packers with whom they competed directly, because the competing packers were authorized to pay less than 75 cents an hour.[29] Cotton ginners in New Mexico complained that employers whose plants were within the area of production as defined and those outside of the area of production competed for employees in the same labor market.[30] A fruit and vegetable canner complained that, with one exception, all of his competitors meet the requirements of the definition.[31] Unfortunately, many of those whose responses to the Administrator's request for proposals indicated that competitive discrimination existed, did not appear at the hearing.[32] However, evidence of discrimination was offered at the hearing with respect to operations performed on fruits and vegetables, grain, cotton and tung nuts.[33]

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[29] See prehearing proposals submitted by Growers Exchange and Battaglia Produce Shippers, both of Norfolk, Virginia.

[30] See prehearing proposal of New Mexico Ginners Association.

[31] See prehearing proposal of Humboldt Canning Co.

[32] For example, the proponents mentioned in footnotes 29 and 30. This was also true of Claybrooke Warehouse Gin Co. which stated that the competitive inequality made it impossible to stay in business. See prehearing proposal of that company.

[33] Tr. pp. 142, 174, 184 (fresh fruits and vegetables), 425 (grain), 674–675, 733 (cotton), 756 (tung).

The evidence as a whole points up the obviously undesirable effect of the present definition—not all establishments have the same status under it; some are denied the exemption while others utilize it and therefore operate with reduced labor cost. Witness after witness urged that all employers in his industry should be subject to the same requirements; many indicated that definitions which had the effect of denying the exemption to all competing employers would be as acceptable as definitions making the exemption available to all such employers.[34] A definition which would accomplish either of these results would of course eliminate the discrimination of which the witnesses complained. Definitions which would deny exemption to all would in effect delete these sections from the Act; definitions which would make exemption available to all, would in effect delete the words "area of production" from the Act. In either event, such definitions would negate the Congressional intent to exempt some but not all of the employees employed in the enumerated operations.[35]

Geographic area as a solution to discrimination.—Among the proposals frankly designed to exempt all or practically all establishments in a particular industry, by far the most frequently

[34] Tr. pp. 84, 87, 188, 218 (fresh fruits and vegetables), 489 (grain), 756 (tung).

[35] *Addison* v. *Holly Hill Fruit Products Co.* (322 U. S. 607).

advanced was the proposal to define "area of production" as the geographic area in which the commodity is grown. Prominent among the proposals of this type were those advanced by representatives of the cotton industry. In response to the Administrator's original request for proposals, the industry's representatives urged adoption of a county production criterion in lieu of both the mileage and population tests of the current definition.[36] Under this prehearing proposal, employees would be considered exempt if engaged in the enumerated operations in an establishment located in any county in which the 5-year average production of cotton is not less than 1,000 running bales. Several special provisions were also suggested for determining the status of employees in an establishment located near a county line. These proposals were, however, withdrawn at the hearing and in their place the proponents substituted the recommendation that for cotton, the area of production be defined as all counties in which any cotton is grown.[37]

Whether a minimum production requirement is included or not, it is clear that a definition employing as a sole criterion the cotton production of the various counties has the very obvious advantages of readily available data and ease of

[36] Prehearing proposals, National Cotton Compress and Cotton Warehouse Association, National Cotton Council, National Cotton Ginners Association, Georgia Cotton Ginners Association.

[37] Tr. pp. 608, 673-674, 710, 724.

comprehension, and would materially simplify a difficult problem of administration and enforcement. The Bureau of the Census regularly publishes statistics which show cotton production for each year. These statistics are obtained from reports based on records which ginners are required to keep, which show the county in which the cotton they gin is grown.

Desirable as are simplicity and ease of administration, these advantages are far outweighed by the fact that the proposals fail to accomplish the purpose of the definitions. It is clear from the record that under the proposals, all gins and compresses would be exempt as would practically all non-compress warehouses.[38] Moreover, it seems clear that the fact of location in a county which produces cotton is not necessarily indicative of the nature of the local economy. It is not unusual, for example, to find a highly urbanized and industrialized sector or pocket within a county producing cotton. Thus, large industrialized urban areas like Atlanta, Houston, and Memphis, are located in counties which meet the test of minimum production of 1,000 running bales of cotton each year[39] and, if the proposals

[38] Tr. pp. 613, 627; Prehearing proposal, National Cotton Compress and Cotton Warehouse Association.

[39] Cotton Production in the United States, U. S. Department of Commerce, Bureau of the Census, Agricultural Division.

were adopted, plants located in those cities would be within the area of production. The economic influences which operate in such cities are clearly urban-industrial rather than rural-agricultural.

That there is no necessity or predictable relationship between county production data and the location of cotton warehouses seems well established by the data submitted by the National Cotton Compress and Cotton Warehouse Association in support of its proposal. The data indicate, for example, that although Pinal County in Arizona produced more cotton than any other county in the State, there is neither a compress facility nor a cotton warehouse in the county.[40] Rather, *all* the county's warehousing and compressing is done in Phoenix, the largest city of the State. Since Phoenix is itself located in a county which produces cotton, plants situated there would be within the area of production if the proposal were adopted. In Louisiana, the data submitted show, *all* of the cotton compression and storage facilities in Caddo Parish, the largest cotton producing county in the State, are located in Shreveport, the second largest urban community in the State.[41] The data submitted in support of the proposal also point out that cotton compress and warehouse plants are located in many of the most

[40] Prehearing proposal, National Cotton Compress and Cotton Warehouse Association, p. 23.

[41] Id.

citified communities in the country.[12] Adoption of the amended proposal would provide exemption for the plants, it would appear, if it could be shown that *any* quantity of cotton is grown in the county.[13] In brief, adoption of the proposal

[12] Ibid., Appendices J and K. The material in these appendices was taken from the "Classification of Cotton Compresses, Warehouses and Wharves for Season 1945–1946." The most recent edition of this classification, for the season 1952–1953, prepared by the Cotton Warehouse Inspection Service, shows that warehouse facilities (and in most instances, compress facilities as well) are located in Birmingham and Mobile, Ala.; Los Angeles, Calif.; Savannah, Ga.; New Orleans, La.; Charlotte, No. Carolina; Chattanooga, Tenn.; Dallas, Fort Worth, El Paso and Houston, Texas; and Norfolk, Va., among others.

[13] Tr. pp. 620, 640–641. The proposal, it seems clear, was intended to provide exemption for a plant physically located in a county in which *any* cotton was produced, notwithstanding that the operations of the plant were performed on cotton actually produced in other producing areas, no matter how distant. Thus, it was testified, such a plant should be considered within the "area of production" even if the cotton were produced in China (Tr. pp. 613–614, 617). In this respect, the proposal is very similar to that made on behalf of Walter Hohn and Co. That company bought tomatoes grown in Mexico, several hundred miles south, and sought exemption on the basis, presumably, that it was within the "area of production."

Although the cotton proposals were made on the basis of the physical location of the plant in an area in which cotton is grown, it seems clear that when extended to other commodities, such as fruits and vegetables, eggs, etc., the result would be, since practically every county in the United States has at least some production of some agricultural or horticultural commodity, that all of the operations named in the statute would be exempt.

The viewpoint of Mr. Todd, the representative of the Cotton Compress and Cotton Warehouse Association, implies

would provide exemption for cotton gins, compresses and warehouses even in large cities and would require, in effect, that the Administrator find that in many of the most highly urbanized and industrialized cities of the United States, the economic influences of agricultural labor conditions are so significant as to affect the fixing of minimum wages and maximum hours.

Other representatives of industry who urged the adoption of a definition under which the Administrator would locate the physical limits of the area in which the particular commodity is grown presented maps on which were outlined the geographical areas which they thought were properly the "area of production." Such maps were presented on behalf of the Southeastern Peanut Association [44], the Type 62 tobacco processors [45], and

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that if there is *any* production of *any* agricultural or horticultural commodity in a county, that county is a geographical area within which the Congress intended that the enumerated operations would be exempt. On this point, the testimony at tr. pp. 642–647 is most revealing. Mr. Todd pointed out that "The Supreme Court in that [*Holly Hill*] decision said nothing about being relatively near the production of the units serviced," and, further "I think what the Congress had in mind, in part at least, was that if a plant is located in an area where the commodity is produced, the economy of that area is largely controlled by agriculture; and I don't think it made any difference to Congress whether some of the units handled by plants in such an area came from China or San Francisco or any other place."

[44] Exhibit 24, Southeastern Peanut Association.

[45] Exhibit 28, Type 62 Tobacco Processors.

the tung nut processors.[46] These proposals must similarly be rejected because their effect is to exempt all or practically all employees without distinguishing between urban-industrial and rural-agricultural communities.

Another group of proposals was quite frankly designed to exempt or deny exemption to a particular group of employers or a branch of an industry, without regard to the effect of the proposal on other employers or industries. Thus, employer representatives concerned primarily with grower-owned cooperative vegetable packing houses urged a definition which would provide exemption under section 13 (a) (10) for employees engaged in handling or packing fresh vegetables as long as title to the commodity handled or packed is vested in the farmer. The proposed definition provided: "Agricultural commodities will be considered in the 'area of production' under the following conditions: First: That the agricultural commodity remains under the producer's ownership while on the premises of the market preparation facility * * *." Under this proposal, the witness testified, when the packer or handler of the commodity "becomes the possessor of this commodity" he should be deemed outside of the "area of production."[47] It was readily apparent that the proposal would provide exemption only for the proponents and

[46] Exhibit 43, American Tung Oil Association.

[47] Tr. pp. 31–33.

by doing so, secure for them a substantial advantage over their competitors."[48]

Proposals diametrically opposite in their effects were made in several instances by different representatives within the same industry. For the peanut industry, for example, it was recommended by one group of employers that the present definitions be amended so that "open country or rural community" exclude any town or city of any size (now 2,500 or more) and that the maximum mileage be reduced from 20 to 10 miles.[49] Another group of employers in the peanut industry recommended that both the population and mileage tests be striken and in their place the Administrator define "area of production" as the geographical area in which peanuts are grown.[50] The effect of the former proposal would be to deny exemption in all or practically all

[48] See tr. p. 35, in which Mr. Pretzer admits that his proposal would discriminate against the independent packer who, he claims, has no real economic function.

A change in the definition with a similar objective was proposed by the Delaware Mushroom Cooperative Association. That Association proposed that the Administrator amend the regulations "so as to include all processors of mushrooms located within the Chester-Delaware-Newcastle Area as being within the 'area of production.'" The Fred Mushroom Products Company, in protesting against this proposal, stated "If this proposal would come into effect our plant located at Lebanon, Warren County, Ohio, would not be on a competitive price basis with these other plants as we would have a higher labor cost." S. L. #3

[49] Tr. p. 291.

[50] Tr. pp. 319–320.

cases; the latter, to provide exemption in all or practically all cases.[51] A sweet potato packer recommended that the mileage test be increased from 15 to 40 miles and that the population test be changed to "all counties that are primarily rural."[52] Another sweet potato packer from the same region urged that the area of production be limited to the farm on which the commodity is grown.[53] All or practically all sweet potato packers would be exempt under the first proposal; none, or practically none, under the second. A canner of fruits and vegetables proposed a definition which he agreed would provide exemption for all or practically all canners;[54] an association of fruit and vegetable canners in the same geograpic area urged that "all factors considered, we believe that the present definition is as good as can be worked out to suit all segments of the canning industry."[55] Such opposite results of proposals are similarly apparent from the recommendations made by industry and labor representatives in a particular field. A representative of the fresh fruit and vegetable industry in the Yakima Valley stated that, under his proposed definition, "* * * practically everything in the Yakima, Wenatchee, the Hood River, the Med-

[51] The proponents recognized this result, each of the other's proposal. See tr. pp. 295–296, 308–309.

[52] Tr. p. 216.

[53] Exhibit 14, Steven J. Dupuis.

[54] Tr. p. 205.

[55] S. L. #7.

ford areas would be exempt * * *." The proposal of the labor representative of the industry in the same area, that representative testified, would have the effect that "No Yakima Valley commercial operator would be exempt."[56]

The fact that a number of diametrically opposed proposals were submitted does not, of course, have any bearing upon the merit of any particular one. It emphasizes, however, the sharp conflict among those represented. To the extent that such proposals are directed toward changing the present definition without doing violence to the statutory intent they are considered below; to the extent that the proposals provide exemption on an all-or-none basis, they must be rejected for failure to conform to the statutory intent.

Population.—In addition to those witnesses who attacked the population test in the present definition as invalid, some witnesses urged that, even if valid as a test, the population of a place is not determinative of its character as an agricultural or industrial community. They also urged that 2,500 is not appropriate as a dividing line.[57] Much of the testimony of these witnesses consisted of general statements to this effect.[58] In a few instances examples were given of towns, relatively close to each other geographically, one of which

[56] Tr. p. 118.
[57] Tr. p. 148.
[58] See, for example, tr. pp. 87, 102.

exceeded, while the other was less than 2,500. With respect to these it was stated that their character as industrial or agricultural was the same. Instances were cited of towns of more than 2,500 population of which it was stated that they were predominantly agricultural in character, and of towns with populations of less than 2,500 people, said to be industrial in character.[59]

There were some instances in which a population test of 2,500, 4,000, 10,000, or 20,000 was urged as a substitute for 2,500.[60] No supporting evidence, however, was adduced indicating that any particular population figure would accomplish the objective more effectively; in each case, the suggested substitute appeared to be designed to eliminate the particular discriminatory result reported by the proponent.

Labor representatives who appeared at the hearing uniformly urged that the exemption be narrowed rather than extended by any changes in the definitions.[61] Both the CIO and the AFL urged that the 2,500 population test be reduced to 500.[62] As in the case of other proposals to change the population requirement, no evidence was offered to show that a test of 500 would more accurately distinguish between urban and agricul-

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[59] See, for example, tr. pp. 174, 184.

[60] See, for example, S. L. #4, and prehearing proposals of Defiance Milk Products Co., Batesburg Fertilizer Co. and Delaware Mushroom Coop. Assoc.

[61] Tr. pp. 501, 786.

[62] Tr. pp. 515, 789.

rural areas. One local AFL union in the fresh fruit and vegetable industry urged elimination of the population test and substitution of a test of dollar volume of production.[50] Another AFL affiliate supported the proposal of the parent organization but its representative also stated "We have no real or substantial complaint to make concerning the existing definition."[51]

The 2,500 dividing line in the present population test has a history of usage, almost half a century long, by various Government agencies, including the Bureau of Census, Bureau of Agricultural Economics and the Federal Emergency Relief Administration. As the then-Administrator pointed out in promulgating the present definition, "It has furnished the definition of 'rural' communities which has been the basis of studies of rural and urban communities by many sociologists. It has been incorporated into statute by the Congress of the United States in special legislation 'for rural communities.' " A footnote appended at this point stated: "See, for example, 30 Stat. 356; 40 Stat. 1189, 'an act appropriating funds for the construction of rural post roads.' On the other hand the Rural Electrification Act (7 U. S. C. A. Sec. 913) defines 'rural area' as

[50] Under this proposal, the minimum wage and overtime requirements would apply whenever the "amount of business in commerce (exceeds) $10,000 annually." (Tr. p. 148). A comparable proposal, made by Hartford Packing Co., urged that the area of production be limited to canners producing 5,000 cases or less. See prehearing proposal of that company.

[51] Tr. p. 495.

'any area of the United States not included within boundaries of any city, village or borough having a population in excess of fifteen hundred inhabitants."[65]

In preparation for the hearings held in 1945, and again after those hearings, the Administrator made extensive efforts to seek out and analyze available relevant information and data in order to determine whether criteria other than those used in the definition upon which the Supreme Court had ruled in the *Holly Hill* case, could be found. The alternatives examined included size of city; size of city and surrounding area; size of city, surrounding area and metropolitan districts; density of population; density of population and size of city; percentage of rural farm to total population; percentage of rural farm population and size of city; gainful employment in agriculture as a percentage of total labor force; percentage of agricultural labor and size of city; percentage of farm acreage devoted to particular commodities; percentage of farm acreage and size of city; percentage of cropland harvested devoted to particular commodities, percentage of cropland harvested and size of city; distance from which

[65] The Federal Aid Highway Act of 1944, Public Law 521, defined urban area as "an area including and adjacent to a municipality or other urban place of 5,000 or more, the population of such included municipality or other urban place to be determined by the latest available Federal census." Tr. p. 17.

produce is received; and mileage and size of city."[66] In summary it may be stated that the search for alternative criteria was unsuccessful; the Administrator concluded that the mileage and population tests most effectively carried out his statutory duty to define "area of production."

Relatively few of the witnesses at this hearing offered any substitutes for the population and mileage tests as criteria for distinguishing agricultural areas. Among those representatives of the fresh fruit and vegetable industry who appeared, however, some advanced in a general way a proposal based on "an area the economy of which is based upon agriculture" or a variant thereof, such as "an area where agriculture is part of the basic economy."[67] No data were introduced to show how effective the proposal would be in accomplishing the statutory purpose. In the questioning of these witnesses, I inquired as to how the proposal could be implemented, or if, as suggested by the witnesses, the concept were incorporated into the regulations, how it could be administered. The questioning failed to produce any but the most general and subjective standards. One witness urged that implementation would be provided by the use of the definition:

[66] Record, 1944-45 Hearings on Area of Production, Economic Reports—Fresh Fruits and Vegetables (Nov. 1944), Cotton (Dec. 1944), Tobacco (Dec. 1944), Dairy Products, Poultry and Eggs (Jan. 1945), Grain, Seeds, and Dry Edible Beans, Peas (Jan. 1945).

[67] Tr. pp. 61, 104.

"an agricultural area is one in which the industry and its maintenance as a unit is based primarily on agriculture."[68] Another urged that the Divisions seek out "evidence of the storekeepers where the money came from, evidence of the bank where the bank deposits came from." The same witness testified that "in the large proportion of cases it would be clear as a bell that the economy was primarily based on agriculture."[69] A third proponent of this concept recognized the subjective nature of the proposal: "there is a large segment that would clearly be industrial * * * there is a large volume of others that would be clearly agricultural. I will grant that you are going to have some that are in the middle, and that it would become, in effect, a matter for an employee in the Department of Agriculture or official who could fairly and realistically appraise the facts."[70] In short, none of the testimony indicated sources of information which could be utilized in developing objective standards, so that employers and employees could proceed with any degree of certainty as to their rights and obligations under the law. The complete subjectivity of the proposals was indicated by the fact that the first proponent of this concept applied it and concluded that Yakima, Washington is an industrial area the second proponent applied the concept

[68] Tr. p. 74.
[69] Tr. p. 259.
[70] Tr. p. 116.

and concluded that Yakima, Washington is an agricultural area; both citing circumstances in which the application of the proposals would be clear.[1]

Following the hearing, notwithstanding the difficulties inherent in the proposal and the fact that similar proposals were explored in connection with earlier hearings, at my request and with the approval of the Administrator, the Division of Research and Statistics undertook a survey of the total information available which might be of value in developing objective standards for the application of the proposals or other possible methods for distinguishing rural and industrial economies in particular localities. It was thought advisable to delay the decision in this proceeding until the survey could be completed. The search included known statistical compilations, directories and periodicals; a survey of information collected by Government and nongovernment agencies. Representatives of Government and private agencies were also consulted concerning sources and procedures for obtaining the desired data.

Because of the emphasis during the hearings on income data as a determinant of the nature of local economies, the search undertaken by the Divisions emphasized income data and sought geographical distribution of such data. The most detailed geographical breakdown for which in

[1] Tr. pp. 74, 118.

come data are available is found in the Bureau of Internal Revenue data, which are distributed by State rather than by smaller geographical units. Moreover, the data are not distributed by industry group, but rather by income type, e. g., wages and salaries, interest, dividends, etc. The complete absence of adequate data on income by industry group, distributed geographically by units smaller than States eliminated this particular approach.

Most promising for the purpose intended, it was found, were the census data on employment for urban places, classified by industry group. Such data, it was believed, would show the nature of employment in the geographic areas covered. Special tabulations were prepared by the Bureau of the Census at the request of the Divisions, classifying employment data by industry group in more detail than the published data. Efforts to evaluate these data revealed several inadequacies. An important inadequacy of the employment data was that such data are not available for places of less than 2,500 inhabitants.[72] Another important

[72] This defect, though significant, was not considered to have destroyed the value of the data, since the determination of the economic nature of all places of less than 2,500 population would not be practicable anyway because of the large work load involved in relation to time and budget limitations. (The 1950 census of population shows 14,264 such places in the United States.) This difficulty accounts in part for the assumption in the present regulations that establishments in such places are rural-agricultural rather than urban-industrial.

inadequacy is that census data are gathered by place of residence and industry group; the place of employment of the person enumerated is not necessarily the place where he resides.[13] Census industry groupings include under both "agriculture" and "manufacturing" employment in operations among those for which exemption is provided under sections 7 (c) and 13 (a) (10) of the Act.[14] Finally, since census data are gathered during April employment in agriculture is obviously understated if it is to be used for the purpose of reflecting the agricultural nature of a locality.

[13] A significant example is the fact that census employment statistics for urban places include the employment statistics only of residents of those places. Since most farm workers do not live in cities or towns, employment data for urban places may not reliably indicate the extent of agricultural labor conditions to which these centers are subject. As a result such data would furnish an incomplete picture of the actual number of persons in the rural "labor market area" who work in agriculture. Moreover, there is no predictable relationship between the proportion of farm workers who live in urban places and those who live within the surrounding areas. The best available data on agriculture employment are county data.

[14] Thus, included by the census in the industry grouping "agriculture" are persons employed in cotton ginning and compressing, corn shelling, sorting, grading and packing of fruits and vegetables and similar operations. Included by the census in the industry grouping "manufacturing" are the manufacture of food and kindred products, chemicals and allied products and other non-durable goods. These groupings include employment in canning, making dairy products, and tobacco stemming for which exemption may be available under sections 7 (c) and 13 (a) (10) of the Act.

As the information was developed it became obvious that inherent in the problem were apparently insurmountable difficulties including inadequacies of available data and the fact that at some level of evaluation arbitrary criteria must necessarily be used. Ultimately, the pyramiding effect of the inadequacies of the available data and the arbitrary criteria necessarily employed made apparent the practical impossibility of achieving a more effective method for classifying the economies of rural areas through the use of such data. This seemed true even though the results of the analysis made indicated that some places with population of 2,500 or more had economies which could be characterized as allied primarily to agriculture, while at the same time establishing the likelihood that, were the appropriate data available, some places with populations under 2,500 would probably be characterized as primarily nonagricultural, under the same criteria.

It appears from the record that the alternative criteria for the population test which were suggested at the hearing or studied thereafter, are subject to at least as many infirmities, are less workable and do not accomplish the desired result with any more precision than the population test. There seems little doubt that whatever means are adopted for distinguishing rural from urban and industrial from agricultural, the result can only be an approximation. No evidence was adduced at the hearing nor was any information obtained

thereafter tending to show that such a distinction may be more accurately made by a substitute for the population test; on the basis of all the information available, it is reasonable to conclude that there is serious doubt that a practicable substitute may be found.

On the basis of all the evidence, it appears that by and large, the economic influences affecting agricultural labor conditions have little or no force in plants located in urban areas, including towns, cities, metropolitan areas or other regions with a relatively high density of population, and the effect on agricultural labor conditions of applying the Act within such areas appears remote. A population test of 2,500 has historically been used to distinguish urban from rural. Studies of population tests other than 2,500 have failed to establish that they would effect such distinction with any more precision. The 2,500 test, while not precise enough to constitute a perfect method of distinguishing between industrial and agricultural conditions, is at least as precise as any other that has been considered. Accordingly, it still seems to be the best test available for accomplishing the objective.

Mileage.—During the course of the hearing, criticism was also leveled at the mileage test. Much of the criticism was, as in the case of the population test, directed at eliminating the test in its entirety. Other criticism was in the form of proposals to increase or decrease the mileage

requirement, the direction depending primarily on the proponent's basis belief as to whether the discriminatory results of the statutory provision should be minimized by extending or narrowing the exemption."

As has already been indicated in this report, some form of distance test has almost always been included in the Administrator's definitions. The very first definition of "area of production" incorporated a test relating to the distance of the establishment in which the enumerated operations are performed from the farm on which the commodities are grown. The present mileage requirement, differing for the various commodities and, in some instances, for the various operations on the commodities, has been evolved historically from the "immediate locality" provision of the first definitions and the "general vicinity" provision of later definitions. The decision of the U. S. Supreme Court in the *Holly Hill* case included the distance concept in the phrase "more or less near." The decision in the *Traders Compress* case specifically held that the test of "distance from which enterprises obtain commodities on which they perform operations enumerated in the statute" is a relevant test for the Administrator to use. The court also pointed out that the test "was one of the basic criteria for the definition in the *Addison* case, and the [U. S. Su-

[78] See, for example, tr. pp. 162, 216, 274, 534.

preme] court, impliedly at least, sanctioned its relevancy as a permissible economic factor."

The specific distances incorporated in the present definition were arrived at after extensive studies. From analysis of the available data, the Administrator concluded that "the longest hauls of agricultural or horticultural commodities normally occur when the commodity is moved to an establishment which has not been located principally to serve the nearby farms, but for reasons involving nearness to terminal facilities, markets, labor supply or other such considerations."[76] His report indicated that a great variety of economic factors affecting the decision as to appropriate distances was weighed. However, it is clear that in avoiding the impracticable task of making particular definitions for each of the 300 different commodities and for each of the large number of different geographical regions where many of the commodities are produced, he found it essential to do some grouping of commodities and averaging of distances.

Much of the testimony at the hearing indicated that the distance tests in the present definition have in fact served reasonably as a test in the demarcation of the area of production.[77] The evidence was also convincing that in most instances since the present definition was adopted, there have been no substantial changes in the areas over

[76] Findings of the Administrator, Dec. 18, 1946, p. 10.

[77] See, for example, tr. pp. 301, 429.

which establishments reach to obtain the commodities on which the enumerated operations are performed.[78]

On the other hand, there was testimony to the effect that improved rural roads and an increase in the size and number of farm trucks have, for some commodities in some areas, widened the source of supply.[79] The evidence was also to the effect that these changes have been accompanied by increasing efficiency of operation in the establishment and by technological improvement in plant equipment. For example, the testimony as to cotton ginning was to the effect that since 1947, the number of new gins and larger gins that have been built and the emphasis on mechanized transportation has meant that gins are now drawing cotton from greater distances than before. These newer gins, it was testified, are not only equipped to handle a larger volume but also to perform additional services such as drying and lint cleaning, and to provide storage facilities.[80] It was urged that the mileage requirement for cotton ginning should be changed to conform with these developments. These representations were made on the basis of the general knowledge of the witnesses. The only spe-

[78] See, for example, tr. pp. 119, 159, 229.

[79] See, for example, tr. p. 725.

[80] Tr. pp. 698–699. See also tr. pp. 616–617 and 510–512 for testimony indicating in general the tendency to increased industrialization in the cotton producing areas in Southeastern United States.

cific data submitted on the actual change in distances hauled showed that during the 1935–1936 season, 96 percent of cotton ginned at selected local markets had been hauled 10 miles or less, while during the 1947–48 season, 93 percent had been hauled 10 miles or less.[81] This relatively minor change, the testimony established, has been accompanied by other changes in method of operation, more significant perhaps than the change in distance hauled. The continuing decrease in the number of gins[82] is indicative of the tendency toward the larger and more highly industrialized ginning establishment, located in a more industrialized community, and performing other operations (in addition to ginning) which were formerly performed at greater distances from the farm.

[81] Exhibit 36.

[82] There was testimony (tr. p. 671) that the number of gins has been reduced from 32,000 in 1902 to 7,568 in March 1954. It is interesting to note the amount of cotton ginned in the two periods:

Year	Running Bales (Thousands)	Year	Running Bales (Thousands)
1900	10,102	1949	15,908
1901	9,853	1950	9,908
1902	10,588	1951	15,052
1903	9,820	1952	14,952
1904	13,451	1953	[a] 15,381

[a] Oct. 1, 1953, forecast, U. S. Department of Agriculture.

Sources: *Agricultural Statistics, 1952*, U. S. Dept. of Agriculture.

Cotton Production in the United States, Crop of 1952, Bureau of Census, U. S. Dept. of Commerce.

The Cotton Situation, CS-149, Oct. 1953, Bureau of Agricultural Economics, U. S. Dept. of Agriculture.

Several witnesses argued that section 13 (a) (10) was incorporated into the statute to insure that the increased labor costs resulting from payment of the minimum wage and premium pay for overtime would not apply to operations where such increased costs would be passed back to the farmer.[83] In part, these witnesses were arguing that under the present definition increased costs resulting from the statutory minimum wage and overtime pay requirements are passed back to the farmer, contrary to the Congressional intent, as a result of which the definition is illegal. In this sense, the argument is part of the major contention that both the population and mileage tests were illegal, discussed above. In another sense, however, the argument is to the effect that a mileage requirement restricts the farmer in making the best bargain for his produce. Such a position appears to attribute to the cost of labor a far more important effect in determining the market price of commodities than it has and fails to consider other significant price-determining factors. Thus, there was testimony which showed that an increase in labor cost to the cotton ginner may be absorbed in many ways including, for example, lower "per unit" costs achieved through higher volume, the performance of additional services so that overhead costs are distributed over a broader base, and obtaining cheaper services such

[83] See, for example, tr. pp. 619, 628, 672.

as electric power." The same witness testified also "I have ginned cotton for 50 cents a hundred and the farmer only received 20 cents a pound for the cotton. I have ginned cotton for 50 cents a hundred when he got 45 cents a pound for cotton." [84]

As was true with the testimony on the population criterion, many of the recommendations on the mileage test were in conflict, and little or no evidence was offered to support the specific mileage proposed. Thus, in the peanut industry it was proposed by one industry representative to increase the 20 miles now in the definition to 50 miles and by another to reduce it to 10 miles.[85] For sweet potatoes it was proposed by one group that the present 15 mile test be increased to 40 miles and by another that "area of production" be restricted to the farm on which the product is grown.[86] Labor representatives uniformly urged that increasing industrialization generally makes it essential that the present mileages be reduced. The CIO proposed that each of the present mileages be halved.[87] On behalf of the AFL it was proposed that 5 miles be substituted wherever the definitions now provide 10, 15, or 20 miles, and that 25 miles be substituted where the present

[84] Tr. pp. 694–702.
[85] Tr. p. 700.
[86] Tr. pp. 291, 333.
[87] Tr. pp. 216, 237 and Exhibit 14.
[88] Tr. p. 514.

definitions provide 50 miles." As in the case of proposals made by the employer groups, little or no evidence was adduced in support of the proposed changes.

In promulgating the present definitions, the then-Administrator referred specifically to the difficulties of selecting appropriate distances and the many factors to be considered. He stated:

> The selection of appropriate distances for the different commodities and groups of commodities has been no easy task, and was accomplished only after carefully weighing and synthesizing a large variety of complicated economic factors. Among the many factors taken into consideration were the following: the kind of crop; the distances from which the establishments in each industry receive the agricultural or horticultural commodities upon which they perform the operations specified in the pertinent sections of the Act; the geography and topography of the various sections of the country in which the different commodities are normally produced; the location of the plants within these areas; the concentration of cultivation of the different commodities in various sections of the country; the pattern of concentration of agricultural production with respect to the location of the establishments; differences in practice as between single crop areas and diversified farming areas; the

[a] Tr. p. 789.

perishability of the commodities received; the extent to which the plants deal with a single commodity rather than a variety of commodities; the nature of the operations performed on the commodities received, including the degree of industrialization of the various operations; the number of hands or operations through which the particular commodity has moved since leaving the farm, including the possibility of passing increased labor costs back to the farmer; the marketing practices of the particular industries; and the wage rates paid, and overtime practices in the various communities concerned with particular commodities."[5]

It seems clear that the Administrator's conclusions as to specific mileages were formulated only after careful consideration and study of pertinent information. That fact itself does not, of course, render them inviolable. Indeed, it is axiomatic that economic factors of this type undergo continuous change in a dynamic economy. In addition, it is clear that a certain amount of grouping of commodities and averaging of distances was necessarily resorted to in establishing general rules which are widely applicable. On the other hand, in view of the careful manner of their promulgation, it seems clear that the established distances should be changed only upon a clear showing that a need for change exists and

[5] Findings of the Administrator, Dec. 18, 1946, p. 11.

upon the basis of comparable information as to the economic factors set forth above. The evidence adduced at the hearing was not of that kind; indeed, little, if any, evidence was offered of the basis upon which the proposals to change the distances were made.

There was testimony, however, which indicated that for some commodities data were not available at the time of the 1944–45 hearings, and that because of the grouping of commodities and averaging of distances, it is possible that the distances may not have been entirely appropriate. An example of an industry about which there was little data is the packing of dry edible beans in Maine, an industry which, it was testified, began commercial operations in 1947 and at the time of the hearing employed approximately 100 people. It is clear that at the time of the 1944–45 hearings the industry was practically nonexistent.[91] This may be true also with respect to operations on tung nuts, an industry whose first commercial yield appears to have been obtained in 1938 but where substantial tonnages were first produced in 1946.[92] At the hearing, neither of these industries or branches presented substantial evidence of the normal length of haul or of other factors mentioned in the earlier finding. Representatives of the Maine dry edible bean

[91] Tr. pp. 525–526, 537.
[92] Tr. p. 743.

packing plants urged a 75-mile test on the basis of the topography of the State without establishing the distances over which the plants reached for their sources of supply. Representatives of the tung industry proposed a 50-mile distance test, largely on the basis that tung oil competes with oil expressed from soybeans and flaxseed—commodities with respect to which, it was testified, the definition now provides a 50-mile test. There would appear to be no doubt that competition for markets is an economic factor which the Administrator may consider in defining "area of production." On the other hand, it does not appear to me that the fact of competition alone establishes a case for changing the present distance requirement; standing alone, that fact does not appear to have any necessary relationship with the normal hauling distance or other factors considered in determining the distance under the present definition of "area of production."

Other provisions of the definition.—In addition to the basic population and mileage tests of the present definition, several provisions were included to implement those tests. First, in connection with the population test, the present definition provides that "open country or rural community" excludes not only any city, town or

[1] The regulations specifically provide a 50-mile test for operations on soybeans. Flaxseed is not specifically mentioned in the regulations and therefore is subject to the 20-mile test.

urban place with a population of 2,500 or more, but also any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

three air line miles of any city, town, or urban place with a population of 50,000 up to but not including 500,000 or

five air line miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

This provision was included in the present definition in part to accomplish the basic purposes of the definition by excluding from the "area of production" establishments subject to urban-industrial labor conditions even though not located within the political boundaries of cities or towns. This provision also is effective in avoiding discrimination against employers located within the limits of a town while giving a competitive advantage to employers whose establishments are located just beyond the town boundary.

Witnesses at the hearing did not, to any substantial extent, address themselves to this provision. Both the AFL and the CIO proposed amendment to provide bands of one air line mile for populations to 10,000; three, for populations to 5000; five, for populations to 500,000;

ten, for populations over 500,000.[34] A representative of the sweet potato industry proposed a 150-mile band around cities with populations of 20,000 or more.[35] The silence of other witnesses, however, on these provisions of the definitions, coupled with the fact that the few proposals made were not supported by evidence establishing a need for change, appear to support the conclusion that the provision is accomplishing the purposes intended.

Second, under the mileage test incorporated in the present definition it is not required that all the commodities be received from within the specified distances but rather that 95 percent of the commodities come from such distances. This provision was included in the definition in order that the exemption might apply despite the receipt of an occasional shipment from a remote or undeterminable source.

The hearing did not establish any substantial interest in changing or amending this provision of the definition. In a few scattered instances witnesses urged the substitution of 75 percent for 95 percent.[36] The context establishes that in almost each instance the proponent was seeking to extend the existing mileage requirement. Such purpose should, if warranted, be accomplished

[34] Tr. pp. 514, 789.

[35] Tr. p. 216.

[36] Tr. pp. 162, 274. See also prehearing proposals, Agricultural Producers Labor Comm. and Dairy Industry Comm.

by the more direct method of changing the mileage. In any event, no specific evidence or arguments were offered in support of the proposed change.

Finally, the present definition incorporates the following provisions:

> "The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

When adopted, the preceding calendar *month* was preferred to the alternative of the preceding calendar *year* because of the greater accuracy with which it reflects current operations. The preceding calendar month is, of course, more stable as a basis for computation than the preceding calendar *week*. Some witnesses suggested the *current* calendar week, month, or year, as an alternative at the hearing." However, questioning established that such a test is completely impracticable—there is no way to determine whether the Act's minimum wage and overtime pay provisions are applicable to any particular work while the work is done. No evidence was offered that the

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[8] Tr. p. 208.

preceding calendar month has resulted in inequities, or that there was need for change. No practicable way of making the determination on a current basis was developed at the hearing, nor did any proposal appear, under questioning, to provide a test with the same relative stability which also reflected current operations as does the preceding calendar month test.

SUMMARY AND CONCLUSIONS

1. The picture presented by the record is one of misunderstanding and confusion as to the purpose and scope of the statute, the authority of the Administrator, the effect of the existing regulations and the purpose, effect, and scope of the changes advocated at the hearing. Superimposed upon the background of confusion and misunderstanding were many sharp conflicts of interest, not only between labor and employers but also between different groups of employers—the cooperative against the independent, the employers in the high wage against the employers in the low wage areas, and employers who already have the exemption against those who do not.

2. Considerably less interest was evidenced in this hearing than in the previous hearings. Large segments of the major industry groups which employ approximately three-quarters of the employees who are affected by the definition, were not represented at the hearing.

3. Some of the definitions proposed at the hearing would include operations other than those enumerated in the law. Other proposals made would have the effect of extending exemption from the Act's minimum wage requirements to activities for which only the overtime exemption was intended by the Congress. Such proposals are beyond the Administrator's authority.

4. The hearing established that many proposals were made to change the definition in order that the proponents might be protected against the eventuality of future need. In most such cases, the proponents admitted that there was no present need for amendment or change of the definition.

5. In a few instances it appears that the present mileage tests were determined without benefit of data as to specific commodities. Such a result may have occurred in two types of situations: (1) that group of commodities characterized in the definition as "commodities not otherwise specified in this subsection" for which a general 20-mile distance test was established, and (2) new and small industries which either did not produce at all or had insufficient production volume at the time the distance test was established to provide any significant data. In appropriate instances of these kinds a change in the mileage requirements may be justified.

6. The record contains uncontroverted evidence of the discriminatory effects of the present defi-

nition of "area of production." Employers who may not avail themselves of the exemption provisions in sections 7 (c) and 13 (a) (10) of the Act find themselves in direct competition with employers who may. Much of the testimony frankly recognized that discrimination is inherent in the statutory provisions. Some proposals were designed to avoid this discrimination by providing exemption for all or practically all employees in a particular industry or branch; others would have eliminated the discrimination by withholding the exemption from all employees. Some witnesses stated that it would not matter whether all competitors could take advantage of the exemption or not—the important consideration was that all should be treated alike. Other proposals were made which would have shifted the discriminatory effects of the definition from one group to another. Generally the evidence showed the results of such shifts would merely have been to make the exemption available to the group urging the particular proposal.

7. Many proposals made during the course of the hearing are substantially identical with proposals made by the same proponents in previous hearings before the Administrator and in some cases before committees of the Congress in connection with proposed amendments to the Act. The reiteration of such previously rejected proposals is indicative both of the continuation of the problem and the difficulty despite years of experi-

ence and additional judicial review of achieving a new and satisfactory solution.

8. No change in the lines drawn by the previous definition which falls short of denying or granting the exemption to all employees in an industry can accomplish anything but a shifting of the discriminatory effect from one group to another. Moreover, the many attempts to draft revised and improved definitions, and the extensive studies made, have thus far proved unsuccessful in achieving a definition which is non-discriminatory and also carries out the Congressional intent. The only previous definition which was successful to a considerable degree in minimizing inequities was declared invalid by the Supreme Court in the *Holly Hill* decision.

9. The present definition accomplishes the statutory purpose more effectively than any definition proposed at the hearing. Changes in the present definition within the limitations imposed by the decision of the U. S. Supreme Court in the *Holly Hill* case would at best be only palliative in their effect. At worst, they would widen the existing areas of confusion and uncertainty and shift and intensify the inequitable effects. The only real and lasting solution to the problem is a legislative one.

RECOMMENDATIONS

1. I recommend that no change be made in the present definition of "area of production" and,

to the extent that the proposals made during the course of the proceeding constitute petitions for amendment of the regulations under section 536.3, I recommend that they be denied.

2. I recommend that the Administrator again represent to the Congress that revision of the statute is necessary to eliminate competitive inequities.

3. I recommend that the Administrator invite and give priority to petitions for a change in the distance test, under section 536.3 of the present regulations, from those industries which (1) had insufficient production volume at the time the distance test was established to provide any significant data, or (2) perform operations on that group of commodities included in the "not otherwise specified" category of the definition.

NATHAN RUBINSTEIN,
Presiding Officer.

WASHINGTON, D. C., *June 9, 1954.*

Respectfully submitted.

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